IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.39 OF 2007

Commissioner of Customs (Import) ..Appellant.

V/s.

M/s.Pudumjee Plant Laboratories Ltd. ..Respondent.

Mrs.N.V.Masurkar with H.P.Chaturvedi for appellant.

Mr.J.J.Bhatt, senior Counsel with Ms.Anjali Chandurkar i/b. Kanga & Co. for respondent.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 11TH OCTOBER, 2007.

P.C. :-

1. This appeal is filed by Commissioner of Customs (Import) under section 130 A of the Customs Act, 1962 against the order of the CESTAT dated 4/5/2006.

2. The basic question raised in this appeal is, whether the Tribunal is justified in holding that the respondent / assessee is entitled to the refund of the customs duty paid on the capital goods, when the Dy. Commissioner of Customs had ordered that the refund amount be credited to the Consumer Welfare Fund in accordance with section 27(2) read with section 27D of

the Customs Act, 1962 on the ground that the assessee had passed on the incidence of duty indirectly to other persons.

3. The respondent-assessee had imported capital goods such as cold storage plant with accessories required in floriculture project on payment of duties of custom and pursuant to the order passed by Commissioner of Customs (Appeals) on 24/8/1999, the assessee became entitled to refund of the excess duty paid on the said capital goods amounting to Rs.21,43,845/-.

4. On an application for refund of the said amount made under section 27(2) of the Customs Act, the Deputy Commissioner of Customs by his order dated 20th June, 2000 sanctioned refund of Rs.21,43,845/-, however, the Deputy Commissioner of Customs directed that the said amount be credited to the Consumer Welfare Fund in accordance with section 27(2) read with 27D of the Customs Act, 1962 on the ground that the respondent failed to establish that the duty element has not been passed on to the consumers.

5. On appeal filed by the respondent, the Commissioner of Customs (A) by his order dated

22/3/2001 held that there is evidence to show that the duty element has not been passed on to the customers and accordingly set aside the order in original dated 20/6/2000 and held that the assessee is eligible for refund.

6. On further appeal filed by the revenue, the Tribunal by its order dated 4/5/2006 dismissed the appeal and upheld the order passed by Commissioner (Appeals). Being aggrieved by the aforesaid order, the present appeal is filed by the revenue.

7. The argument of the learned counsel for the revenue is that in the present case, the respondent had availed the depreciation on the imported capital goods atleast for three years which clearly shows that the duty element paid on the capital goods has been taken into consideration in respect of the products manufactured out of the capital goods imported by the assessee. In the light of the decision of the Apex Court in the case of **M/s.Solar Pesticides Pvt. Ltd.** reported in **2000 (116) E.L.T. 401 (S.C.)**, it is submitted that the principles of unjust enrichment applies even in respect of capital goods and in the present case, in the absence of any evidence to the contrary, the adjudicating authority was justifying in

denying the refund to the respondent.

8. It is true that as per the decision of the Apex Court in the case of Solar Pesticides Pvt. Ltd. (supra), the principles of unjust enrichment applies even in respect of duty paid on raw material imported and captively consumed in the manufacture of final products. However, in the present case, the finding recorded by the Commissioner (A) and upheld by the Tribunal is that there is no material on record to suggest that the duty element has been passed on to the consumer. In view of the fact that the sale price of the final product of the assessee matches with the price of other sellers in the market who are using non duty paid identical imported capital goods, it is held that the duty element cannot be said to have been passed on to the consumers.

9. Although the assessee had provided for depreciation on the capital goods by debiting the same to the profit and loss account for three assessment years it is not in dispute that the same has been written back and credited to the profit and loss account in the year 1999-2000. This fact certified by the Chartered Accountants and produced before the authorities below have not been doubted. Moreover, the

finding recorded by the authorities below is that the assessee being a 100% EOU is exempt from income tax and no benefit could be derived by claiming depreciation in the three years before the same was written back.

10. In this view of the matter, in our opinion, the finding recorded by the Tribunal is a finding of fact and no question of law arises from the order of the Tribunal. Accordingly, we do not find any merit in the appeal and the same is hereby dismissed.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)